

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF)
ROBERT W. SULLIVAN d.b.a. CROWN)
CEDAR PRODUCTS,)
Appellant,)
v.)
PUGET SOUND AIR POLLUTION)
CONTROL AGENCY,)
Respondent.)

PCHB Nos. 77-151 and 78-6

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

This matter, the consolidated appeals of four \$250 civil penalties for the alleged violations of Section 9.03 of respondent's Regulation I, came before the Pollution Control Hearings Board, Dave J. Mooney, Chairman, and Chris Smith, at a formal hearing on April 24, 1978 in Seattle. David Akana presided.

Appellant was represented by his attorney, Craig V. Wentz; respondent was represented by its attorney, Keith D. McGoffin.

Witnesses were sworn and testified; exhibits were admitted. From the testimony heard or read and the exhibits examined, and considering

1 arguments of counsel, the Board makes these

2 FINDINGS OF FACT

3 I

4 Respondent, pursuant to RCW 43.21B.260, has filed with this Board
5 a certified copy of its Regulation I, and amendments thereto, which
6 are noticed.

7 II

8 The instant matters are the continuing saga of the parties' struggle
9 which dates back to 1972. During the period beginning September 7,
10 1972 and ending December 7, 1977, appellant was served with 31 notices
11 of violation of respondent's regulations. Some, but not all of the
12 notices, resulted in civil penalties. After 1975, appellant installed
13 a wood waste burner at a cost of about \$20,000 which was to have met
14 all the requirements of Regulation I, according to the appellant.
15 Since the installation of the wood waste burner on appellant's property
16 at 428th Avenue S.E. and S.E. Reinig Road in North Bend, appellant has
17 continued to be cited for violations.

18 III

19 On August 16, 1977 at about 2:30 p.m., respondent's inspector
20 saw bluish smoke coming from appellant's property. He properly
21 positioned himself, made an observation of the plume, and recorded
22 a 45-60% opacity for six consecutive minutes. After taking photographs,
23 the location of the source was verified. Respondent issued a notice
24 of violation by certified mail sent on August 18, 1977. (Exhibit R-7.)
25 Such letter was available to appellant on August 19, 1977. (See Appellant's
26 Exhibit A-4.) From this notice followed a \$250 civil penalty (No. 3454)

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1 from which appellant appeals.

2 IV

3 On August 30, 1977 at about 1:22 p.m., respondent's inspector
4 saw gray smoke rising from appellant's property. He observed the
5 emissions and recorded a Ringelmann 1-1/2 to 2-1/2 reading for seven
6 consecutive minutes. After taking photographs, the inspector verified
7 that the plume came from appellant's wood waste burner. Respondent
8 issued a notice of violation by certified mail sent on August 31, 1977.
9 (Exhibit R-16.) Appellant signed for the letter on September 19, 1977.
10 From this notice came a \$250 civil penalty (No. 3486) and appellant's
11 appeal.

12 V

13 On September 8, 1977 at about 1:23 p.m., respondent's inspector
14 saw blue smoke rising from appellant's property. He took photographs
15 of the plume then made an observation recording an opacity of 30-60%
16 for eleven consecutive minutes. Thereafter, he verified that the
17 smoke came from appellant's wood waste burner. Respondent issued a
18 notice of violation by certified mail sent on September 9, 1977
19 (Exhibit R-21) which was accepted on September 20, 1977. From this
20 notice came a \$250 civil penalty (No. 3512) and appellant's appeal.

21 VI

22 On December 7, 1977 at about 1:45 p.m., respondent's inspector
23 saw gray smoke rising from appellant's property. After positioning
24 himself, he took several photographs, then observed the plume,
25 recording Ringelmann 5 for seven consecutive minutes. He thereafter
26 verified that the smoke came from appellant's wood waste burner. Respondent

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1 issued a notice of violation by certified mail sent on December 8, 1977
2 (Exhibit R-26) which was accepted on December 10, 1977. From this
3 notice came a \$250 civil penalty (No. 3628) and the last of the instant
4 appeals.

5 VII

6 Respondent's Regulation I, Section 9 03(b), makes it unlawful to
7 cause or allow the emissions of an air contaminant as described in
8 Findings of Fact III, IV, V and VI above. Section 3.29 provides for
9 a civil penalty of up to \$250 per day for each violation of Regulation I.

10 VIII

11 Appellant did not report an upset, breakdown, or start-up as
12 provided by Section 9.16 of Regulation I which might have excused
13 violations meeting the requirements of the provision. Three of the four
14 violations occurred during appellant's work break period.

15 IX

16 Respondent mails all notices to appellant. Its inspectors are
17 instructed not to enter appellant's property although the Board's
18 questioning of appellant revealed that appellant has never threatened
19 respondent's inspectors.

20 X

21 Although respondent has no formal guidelines on issuing penalties,
22 it takes into account the record of the appellant, and the efforts
23 made to meet the provisions of Regulation I.

24 XI

25 Appellant's wood waste burner probably fails to meet the provisions
26 of Regulation I because of improper operation and design.

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XII

Any Conclusion of Law which should be deemed a Finding of Fact is hereby adopted as such.

From these Findings the Board comes to these

CONCLUSIONS OF LAW

I

Respondent promptly mailed appellant a notice of each observed violation by certified mail. We believe that such notice to appellant is reasonable and adequate under the circumstances.

Appellant next challenges the Ringelmann readings made on August 30 and on December 7, 1977 as defective for the reason that the background behind the plume was dark and thereby at variance with instructions related on a Ringelmann Chart evidenced by Appellant's Exhibit A-2. Respondent's evidence shows that such exhibit is not used as a standard. Appellant's motion to dismiss on the above grounds should be and is denied.

II

The visual observation method used to determine whether a violation has occurred is well established. Sittner v. Seattle, 62 Wn.2d 836 (1963); Air Pollution Variance Board v. Western Alfalfa, 9 ERC 1236 (Colo. S. Ct. 1976). In the instant matters, appellant has not shown how the alleged potential variables have affected the determination as to whether a violation has or has not occurred. Thus, appellant's challenge to the substance of the regulations or procedures to determine a violation of the regulations fails. Moreover, appellant had responsibility for the design of the wood waste burner and has

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1 present control over its operation. Those variables created by
2 appellant's own actions cannot be asserted as a violation of appellant's
3 rights.

4 III

5 Respondent's regulations have not been shown to apply to
6 appellant and other businesses, some of which are far larger than
7 appellant, unequally.

8 IV

9 Appellant violated respondent's Regulation I, Section 9.03(b)
10 on August 16, August 30, September 8, and December 7, 1977. Each
11 \$250 civil penalty assessed under Section 3.29 for the violations of
12 Regulation I is reasonable in view of the purposes of the Washington
13 Clean Air Act and, under the circumstances of the case, should be
14 affirmed. See Yakima Clean Air Authority v. Glascam Builders, Inc.,
15 85 Wn.2d 255 (1975).

16 V

17 Any Finding of Fact which should be deemed a Conclusion of Law
18 is hereby adopted as such.

19 From these Conclusions the Board enters this

20 ORDER

21 Each of the four \$250 civil penalties (Nos. 3454, 3486, 3512, and
22 3628) is affirmed.

23 DATED this 10th day of May, 1978.

24 POLLUTION CONTROL HEARINGS BOARD

25 DAVE J. MOONEY Chairman

26 CHRIS SMITH
27 CHRIS SMITH, Member

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